



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1995

Mr. Miles K. Risley
Assistant City Attorney
Legal Department
City of Victoria
P.O. Box 1758
Victoria, Texas 77902-1758

OR95-1295

Dear Mr. Risley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 36810.

The City of Victoria (the "city") received a request for the personnel records of a city employee and any records pertaining to inspections, maintenance and/or repair of an ambulance involved in an accident with the requestor's client for the year prior to the accident. The requestor also seeks copies of all investigative reports conducted by the city into this accident. You state that you have released some of the requested information. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). In this instance, you state that the requestor's client was involved in an accident with a city ambulance and that the requestor's client presented a claim against the city. However, you did not submit a copy of this claim. Nor have you indicated that the requestor or another attorney has threatened suit against the city. We therefore conclude that the city has not shown that litigation is reasonably anticipated. Consequently, the city may not withhold the requested documents under section 552.103(a).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. We have previously determined that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under a right of privacy. Open Records Decision No. 600 (1992) at 10. Therefore, we agree with the city's markings showing redaction of this information.

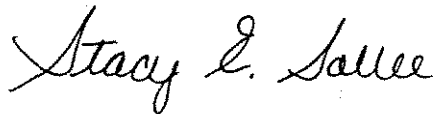
Federal law may prohibit disclosure of this employee's social security number. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). You state that the social security numbers were obtained after October 1, 1990. We note that the federal statute provides that the *law* requiring the maintenance of the employee's social security number must have been enacted on or after October 1, 1990. In other words, the fact that the social security number was obtained after October 1, 1990 by itself does not dispose of the issue. Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

The employee's social security number may be confidential under state law. Section 552.024 of the Government Code was amended to allow a government employee to elect to have not only his home address and home telephone number withheld from disclosure but also his social security number and information indicating whether the employee has family members.¹ Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 5, 1195 Tex. Sess. Law Serv. 5127, 5130 (Vernon) (to be codified as Gov't Code § 552.024). If, at the time the request for information was received the employee had made the election under section 552.024 to keep this information confidential, the city must withhold this information from disclosure. *Id.*, § 9, 1995 Tex. Sess. Law Serv. at 5132 (to be codified as Gov't Code § 552.117).

The personnel file also contains the employee's W-4 form which you contend is excepted from required public disclosure pursuant to section 552.101. This office has determined that this information is excepted from required public disclosure pursuant to section 552.101 in conjunction with federal law. See Open Records Decision No. 600 (1992). You must withhold this information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 36810

Enclosures: Marked documents

¹We note that information concerning whether the employee has family members working for the city and whether the employee is married is a sample of the type of information that would reveal whether the employee has family members.

cc: Mr. David L. Grissom
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(w/o enclosures)